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PRE-APPEAL BRIEF REQUEST FOR REVIEW

Docket Number (Optional)

1400.1376750

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on February 8, 2011Signature Typed or printed name Ross D. Snyder, Reg. No. 37,730

Application Number

10/782,390

Filed

02-19-2004

First Named Inventor

Alexey D. Zinin

Art Unit

2472

Examiner

Chriss, Andrew W

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

This request is being filed with a notice of appeal.

The review is requested for the reason(s) stated on the attached sheet(s).

Note: No more than five (5) pages may be provided.

I am the

- ☐ applicant/inventor.
- ☐ assignee of record of the entire interest.
See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed.
(Form PTO/SB/96)

- ☐ attorney or agent of record.
Registration number _____

- ☒ attorney or agent acting under 37 CFR 1.34.
Registration number if acting under 37 CFR 1.34 37,730


Signature

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Telephone number

February 8, 2011

Date

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*.

☐ *Total of _____ forms are submitted.

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PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant(s): Alexey D. Zinin

Title: PROTECTION OF NETWORK INFRASTRUCTURE AND SECURE
COMMUNICATION OF CONTROL INFORMATION THERETO

App. No.: 10/782,390

Filed: 02-19-2004

Examiner: Chriss, Andrew W.

Group Art Unit: 2472

Atty. Dkt. No. 1400.1376750

Mail Stop AF
Commissioner for Patents
PO Box 1450
Alexandria, VA 22313-1450

PRE-APPEAL BRIEF REQUEST FOR REVIEW

Dear Sir:

Claims 1-38 are pending in this application. The Examiner has rejected claims 1-38. Appellant respectfully requests reconsideration of pending claims 1-38. Appellant files herewith a notice of appeal. Pursuant to the "New Pre-Appeal Brief Conference Pilot Program," 1296 Off. Gaz. Pat. Office 67 (July 12, 2005) and the "Extension of the Pilot Pre-Appeal Brief Conference Program" dated 1/10/2006, Appellant submits a pre-appeal brief request for review. The review is requested for the reasons set forth below:

Appellant submits there exist clear errors in the Examiner's rejections and/or the Examiner's omissions of one or more essential elements needed for a *prima facie* rejection. Appellant submits the Examiner's "Response to Arguments" provides evidence that the Examiner has failed to consider the pending claims as required by the Manual of Patent Examining Procedure (MPEP) and prevailing case law. MPEP § 2141 sets forth the Graham inquiries for a rejection under 35 U.S.C. § 103. MPEP § 2143 discusses basic requirements of a *prima facie* case of obviousness under 35 U.S.C. § 103. As Appellant describes in detail below, Appellant submits there exist clear errors in the Examiner's rejections and/or the Examiner's omissions of one or more essential elements needed for a *prima facie* rejection.

The Examiner has rejected claims 1, 2, 4, 17, 20, 21, 23 and 36 under 35 U.S.C. § 103(a) as allegedly being unpatentable over McDysan et al. (U.S. Patent Application Publication 2003/0112755 A1) in view of Oguchi et al. (U.S. Patent Publication No. US 2002/0067725 A1). Applicant respectfully disagrees.

In the Examiner's Advisory Action, the Examiner states, regarding independent claims 1 and 20, as follows:

Examiner further notes that the claimed "control information" is not further defined in the claim language so as to require a structure or feature of said information other than being "Layer-3 control information." As the DSCP disclosed in McDysan controls the QoS applied to a packet (e.g., in paragraphs 0037 and 0042) and further is indicative of an IP QoS (i.e., Layer-3), Examiner submits that the claim limitation "Layer-3 control information" is met by the disclosure of McDysan.

and

Therefore, when given its broadest reasonable interpretation, Examiner submits that the packet marking via a DSCP code point in IP packets in order to distinguish the appropriate treatment for each packet (see paragraphs 0037 and 0042) disclosed in McDysan meets the broadest reasonable interpretation of the claim limitation "marking packets carrying the Layer-3 control information."

Applicant submits the Examiner alleges "...the DSCP disclosed in McDysan controls the QoS...and further is indicative of an IP QoS (i.e., Layer 3)...," to conclude "...that the claim limitation 'Layer-3 control information' is met by the disclosure of McDysan." However, the Examiner then alleges "...a DSCP code point in IP packets...disclosed in McDysan meets the broadest reasonable interpretation of the claim limitation 'marking packets carrying the Layer-3 control information.'" While the Examiner alleges "...the claimed 'control information' is not defined in the claim language so as to require a structure or feature of said information other than being 'Layer-3 control information,'" Applicant submits the Examiner's assertion can only be pronounced by disregarding the actual claim language through the application of circularly convoluted illogic. While the Examiner alleges that McDysan teaches "...packet marking via a DSCP code point in IP packets" is performed "...in order to distinguish the appropriate treatment of each packet...", Applicant notes the Examiner cites "the DSCP disclosed in McDysan" as purportedly meeting the claim limitation of "Layer-3 control information," apparently alleging that packets exhibiting DSCP are "packets carrying Layer-3 control information." Thus, the Examiner appears to assert contradictory allegations, with the packets allegedly exhibiting DSCP as a precondition to allegedly being marked using DSCP. Applicant submits the Examiner's apparent allegations regarding the supposed teachings of the McDysan reference do not provide any

motivation, suggestion, or even any rational explanation as to either how McDysan could teach marking packets containing the Layer-3 control information when the packets would, at the purported time of such alleged marking, according to the Examiner's allegations, apparently not be "carrying the [purported] Layer-3 control information" or why, on the other hand, if the packets were, according to the Examiner's allegations, already "carrying the [purported] Layer-3 control information," there would be any motivation or suggestion to perform the alleged "...packet marking via a DSCP code point...." Thus, Applicant submits the Examiner's allegations with respect to purported teachings of the McDysan reference appear not to be twisted so as to pervert the plain meaning of the claim language and do not sensibly render obvious the claim language.

Moreover, while the Examiner goes on allege "...that the claim language is silent as to how the packets are encapsulated such that the trusted control information is uniquely identified...", Applicant submits the Examiner then appears to use such allegation as attempted license to disregard the recited claim language. Firstly, the Examiner alleges "...that the claim language is silent...as to what constitutes 'trusted' traffic." Applicant submits the claim language does not recite "'trusted' traffic," but rather "trusted control information." While the Examiner alleges "...the L2TP encapsulation disclosed in Oguchi, whereby the encapsulation identifies the packet as a tunneled (i.e., trusted) packet," in combination with the purported "...Layer-3 control packet marking disclosed in McDysan...", purportedly "...reads on the broadest reasonable interpretation of 'marking packets carrying the Layer-3 control information' and '...encapsulating the packets at Layer-2 to uniquely identify Layer-2 frames as carrying trusted control information,'" Applicant submits the Examiner has not shown any teaching, motivation, or suggestion in the cited references of encapsulating only L2TP VPN packets having a DSCP code point." As a more specific example, Applicant submits the Examiner has not shown why the alleged teachings the Examiner ascribes to Oguchi would not also encapsulate VPN packets of whatever the Examiner might allege not to be "control information" being communicated over the VPN, thereby teaching away from "...encapsulating the packets at Layer-2 to uniquely identify Layer-2 frames as carrying trusted control information." Thus, Applicant submits the Examiner has not shown the cited references to teach or suggest "encapsulating the packets at Layer-2 to uniquely identify Layer-2 frames as carrying trusted control information" even under the Examiner's contorted assertions as to what purportedly teaches "control information." Moreover, Applicant does not cite any portion of the cited references as allegedly teaching or suggesting that a packet allegedly having a DSCP code point and allegedly containing L2TP be encapsulated with a PPP or Ethernet header. As a

more specific example, the Examiner does not allege any teaching or suggestion as to how "...the DSCP disclosed in McDysan..." would purportedly "control" "...the QoS applied to a packet..." if "...the DSCP disclosed in McDysan..." were "...encapsulated with a PPP or Ethernet header...." Applicant submits the Examiner does not show how such encapsulation of the DSCP code point would not render it inoperable, preventing it from allegedly "controlling" "...the QoS applied to a packet." Thus, Applicant submits the Examiner's purported combination of the cited references fails to establish a *prima facie* showing of obviousness with respect to the actual claim language.

Moreover, Applicant submits the Examiner's assertions "...that the claim limitation 'Layer-3 control information' is met by the disclosure of McDysan..." allegedly based on "...the DSCP disclosed in McDysan..." "controlling" "...the QoS applied to a packet" and allegedly being "...further...indicative of an IP QoS (i.e., Layer 3)" and "...the claim limitation 'marking packets carrying the Layer-3 control information...' " allegedly being met by "...packet marking via a DSCP code point in IP packets..." appear to undermine the Examiner rejections in other ways. As an example, as claim 18 recites "...receiving unmarked control packets using rate-limited queues" and claim 37 recites "...wherein the network element is further adapted to receive unmarked control packets using rate-limited queues," Applicant submits the Examiner's assertions of "control" allegedly occurring by virtue of "...the DSCP disclosed in McDysan..." and "...packet marking..." allegedly being accomplished "...via a DSCP code point in IP packets..." teach away from "...unmarked control packets...."

Applicant notes that paragraph [0037] of McDysan, which the Examiner cites in independent claims 1 and 20, as well as dependent claims, such as claims 18 and 37, cites "classifier table 82" as specifying the marking of packets. Applicant notes "classifier table 82," as seen, for example, in Figure 5 of McDysan, apparently specifies, under the heading "M?," marking of all packets. Thus, Applicant submits McDysan, in purported combination with Oguchi and Johansson, teaches away from "...unmarked control packets...." Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness with respect to dependent claims, for example, dependent claims 18 and 37, as well as independent claims 1 and 20. Thus, Applicant submits the pending claims are in condition for allowance and the Examiner has clearly erred in rejecting them.

Other examples of dependent claims where the Examiner's assertions appear to undermine the basis of the rejection, Applicant notes claims 3 and 22, where the Examiner cites paragraphs [0065]

and [0066] of Nakamichi as allegedly teaching a "link state type" allegedly denoting "link-local." Applicant notes Nakamichi appears to distinguish, in paragraph [0055] "packets" from "opaque LSAs." Thus, Applicant submits the Examiner, while having acknowledged, in making the rejection, as follows:

The combination of McDysan and Oguchi discloses all of the limitations of Claims 1 and 20, as described above. However, the references do not expressly disclose marking the packets using a link-local MPLS label.

has not established Nakamichi, or any combination of Nakamichi with the other references that admittedly lack such teaching, as teaching or suggesting "...marking the packets using a link-local MPLS label." Thus, Applicant submits the Examiner has not made a *prima facie* showing of obviousness and has clearly erred in rejecting dependent claims 3 and 22.

Applicant has detailed, for both the independent claims and the various dependent claims, in Applicant's response to the final Office action, Applicant's bases for asserting that the Examiner has not made a *prima facie* showing of obviousness of the claimed subject matter in view the cited references. Applicant hereby reiterates such rationales, as previously stated. For such reasons, in combination with the foregoing reasons, Applicant respectfully requests the rejections be withdrawn and a notice of allowance be issued for the pending claims.

Respectfully submitted,

02/08/2011

Date



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